Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 705.

THE UNITED STATES, PETITIONER,

v.

EMMETT F. DICKERSON.

Brief in Opposition to Petition for Writ of Certiorari.

HERMAN J. GALLOWAY,
Attorney for Respondent.

GEORGE R. SHIELDS,
JOHN W. GASKINS,
FRED W. SHIELDS,
Of Counsel.

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v.

EMMETT F. DICKERSON.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

OPINION BELOW.

The opinion of the Court of Claims (R. 3–9) is not yet officially reported.

JURISDICTION.

The judgment of the Court of Claims was entered November 6, 1939 (R. 9). The petition for Writ of Certiorari was filed February 6, 1940 (R. 9). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED.

Whether Section 402 of Public Resolution No. 122 of June 21, 1938, c. 554, 52 Stat. 809, 818, operated as a *suspension* of the right of men reenlisting in the United States Army during the fiscal year ending June 30, 1939, to the enlistment allowance as provided by Section 9 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 629–630.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set forth in Appendix A to the Petition for Writ of Certiorari (pages 14–16), to which reference is hereby made.

STATEMENT.

The statement of facts contained in the Petition for Writ of Certiorari (pages 2–3) fairly sets forth the facts of the case.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The Writ of Certiorari should be denied because:

1. The case does not involve questions of sufficient public importance to justify its consideration by this Court.

2. The decision by the Court of Claims is correct and sound.

ARGUMENT.

1. The case does not involve questions of sufficient public importance to justify its consideration by this Court. The petitioner urges that the writ be granted because it asserts there is a large number of enlisted men who may make similar claims which would clog the dockets of the courts.

The existence of a large number of potential claimants is not a reason for granting the writ under Rule 38, paragraph 5, of this Court. There is no basis for the suggestion that the decision of the court below may result in the filing of a large number of suits clogging the dockets of the courts. There is just as much probability that such potential claims may be settled administratively if this Court denies the writ as if it grants the writ. The mere fact that a number of persons are affected is no indication that the decision by the Court of Claims is unsound.

The question involved has become moot except for those who reenlisted during the fiscal years 1938 and 1939. Since that time there has been no statutory prohibition upon the use of

existing appropriations for payment of the enlistment allowances and they are now being paid for all reenlistments after July 1, 1939.

The petitioner intimates that other appropriation Acts may be affected by the decision of the court below, but fails to explain how those Acts will be affected. If the several Acts referred to in Appendices B and C to the Petition for Writ of Certiorari (pages 17–21) are intended to illustrate this possibility, an examination of these statutes discloses that they do not presume to alter pre-existing statutory rights and consequently their effectiveness could not be impaired by the principles enunciated by the court below.

2. The decision by the court below is correct and sound.

The court below held that Section 402 of Public Resolution No. 122 (*supra*) did no more than limit the availability of money appropriated for payment of the enlistment allowance provided by Sections 9 and 10 of the Act of June 10, 1922 (*supra*). Petitioner urges, in substance, that Section 402 of Public Resolution No. 122 should have been construed as a "suspension" of those sections of the Act of June 10, 1922, solely because of its legislative history. The clear import of the language used in the Act does not create such a suspension.

Petitioner urges that an intent to "suspend" should be derived, not from the language of Section 402, but from the legislative history of a similar Act for the preceding fiscal year. In this connection it cites certain statements, made on the floor, by two individual members of Congress. No Committee Report was filed, and at most such statements can be accepted only as reflecting the individual opinion of those members and can not be held to represent the opinion of the entire membership of Congress.

It must also be emphasized that many conflicting statements were made by a number of members of Congress in connection with the Act here involved. Senator Byrnes, quoted by petitioner in its brief (page 7), in introducing a Committee Amendment to another appropriation Act, containing language

identical to that of the Act here involved, stated (83 Congressional Record 9189):

> "Mr. President, the amendment offered is solely a limitation as to funds, and is not legislation. It is a limitation upon the funds appropriated in the bill and does not change the existing law. * * *"

Senator Byrnes did, it is true, go on to say that the amendment, if adopted, would prohibit the filing of claims for the allowance by the men. However, other members of Congress did not agree with the Senator as is shown by the following statements made by the late Representative Bacon, who was a member of the Conference Committee, and Representative Wadsworth (83 Congressional Record 8556, 8567):

> "MR. BACON. It seems to me these enlisted men have an excellent case in the Court of Claims to recover from the Government on the contract.
>
> "MR. WADSWORTH. I am not lawyer enough to know about that, but I know in the interest of fair play this practice should be stopped. I know it is not the disposition of the Committee on Naval Affairs to bring in a bill abolishing reenlistment allowances, yet year after year we find tucked away in the back of a deficiency appropriation bill a provision to the effect that no moneys appropriated in any act of Congress in this particular session shall be used to pay these men the money the law says they shall have. * * *
>
> "MR. BACON: I quite agree with what the gentleman is saying, and I am convinced that the enlisted men of the Army, Navy, Marine Corps, and Coast Guard have grounds for a suit against the Government in the Court of Claims. I believe the four departments so concede and I hope the enlisted men bring that suit."

Enough of the legislative history of the Act here involved has been quoted to show that it sheds no light on the intention of Congress in enacting the Act. The legislative history of the Act simply consists of a large mass of conflicting statements and no clear intent to "suspend" can reasonably be derived from it.

Petitioner also seems to contend that some significance must attach to the fact that the provisions here involved were excluded as legislation from an appropriation bill. This is of no consequence whatsoever. The so-called Rural Electrification Act, which included the provision here involved limiting the use of the appropriation for the payment of this allowance, was passed as a part of the Work Relief and Public Works Appropriation Act of 1938 (c. 554, 52 Stat. 809). In fact the provision limiting the availability of certain appropriations for use in the payment of the enlistment allowance was first enacted in a Deficiency Appropriation Act for the fiscal year 1938 (c. 277, 50 Stat. 213, 232). Besides this, the fact that the provision may have been ruled out on a point of order is no proof that such provision had any effect other than merely making unavailable the use of the appropriations for the payment of reenlistment allowances. The test as to whether the amendment was an attempt to legislate in an appropriation Act is whether it changed existing law. At the time the proposed amendment was ruled out, the Act of June 10, 1922, creating the right to the allowance was in full force and had not been repealed or suspended for the fiscal year 1939. The Regular Army Appropriation Act had been passed (c. 347, 52 Stat. 642) and therefore under then existing law the enlistment allowances were payable and the Army appropriation Act for that year was available for their payment. This amendment merely rendered the appropriation unavailable and to that extent only changed then existing law and was therefore not proper in an appropriation Act if a point of order was interposed.

Even if it be assumed that the legislative history of the Act was clear, petitioner's contention that the meaning of the statute must be derived therefrom is fallacious. Petitioner fails to state anywhere that the meaning of the language of Section 402 is doubtful or that it is not clear. It obviously is clear and unambiguous. It plainly imposes a limitation upon the use of appropriations and nothing more. There is no language used in the statute which suspends the right to the allowance. This Court has repeatedly held that plain and unambiguous language requires no construction. *Insurance Co.* v. *Ritchie*, 5 Wall.

541, 545; *Boudinot (Cherokee Tobacco)* v. *United States*, 11 Wall. 616, 620; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313. This principle precludes consideration of the legislative history of statutes in an effort to disclose an intent other than that naturally derived from the clear language of the statute. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278; *Wilbur* v. *United States, ex rel.*, 284 U. S. 231, 237; *Fairport, etc. Company* v. *Meredith*, 292 U. S. 589, 594; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 449. Legislative history of an Act as an aid to the construction of an Act is only admissible to solve doubt and not to create it. *Wisconsin R. R. Commission* v. *Chicago, etc., R. R. Co.*, 257 U. S. 563, 589. Nor are the words of a statute to be altered in the interest of the imagined intent. *United States* v. *Riggs*, 203 U. S. 136, 139.

It must also be emphasized that the court below properly attached considerable significance to the fact that Congress in enacting the Act here involved radically departed from the plain language it had used for several years in the Acts expressly "suspending" for the fiscal years 1934–1937, the operation of Sections 9 and 10 of the Act of June 10, 1922. The petitioner, without offering any explanation for this significant change of language, would have this Court place a meaning upon the Act here involved identical to that of the Acts for the fiscal years 1934–1937 and contrary to the plain meaning of the words used in the statute here involved. This contention ignores the many decisions of this Court holding that a change of language clearly shows a change of intent. *United States* v. *Fisher*, 2 Cr. 358 (1 Dall. 421, 424); *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 448; *Brewster* v. *Gage*, 280 U. S. 327, 337. Construction obviously can not make identical that which is radically different. *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 199.

The decision of the court below is not in conflict with applicable decisions of this Court. The court below held that the meaning of Section 402 is clear, and that it did no more than limit the availability of appropriations for the payment of the enlistment allowances. Therefore, it operated as a limitation

upon the authority of administrative officers to pay the allowances and did not operate as a repeal, modification or suspension of the basic right created by the Act of June 10, 1922. This Court has recognized that the failure or refusal of Congress to appropriate does not result in the repeal, modification or suspension of an earlier permanent pay statute in the absence of language so providing or language clearly implying such a result. *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Vulte*, 233 U. S. 509. *Cf. United States* v. *Minis*, 15 Pet. 423, 445.

In the cases of *Mathews* v. *United States*, 123 U. S. 182; *Wallace* v. *United States*, 133 U. S. 480; *Dunwoody* v. *United States*, 143 U. S. 578, and *Belknap* v. *United States*, 150 U. S. 588, cited by petitioner (page 12), this Court specifically recognized the principle of the *Langston* case, *supra*, but in each of them distinguishing facts precluded application of the rule and prevented recovery by the plaintiff. Similarly, in the case of *United States* v. *Mitchell*, 109 U. S. 146, while it was decided prior to the *Langston* case, *supra*, this Court recognized the principle later announced in the *Langston* case, but the facts in the *Mitchell* case precluded recovery by the plaintiff.

The principle of the *Langston* case, *supra*, has been applied and the plaintiff has been granted a recovery for a statutory salary or allowance despite the failure or refusal of Congress to appropriate funds for payment of it in the following cases in the Federal courts: *Bell* v. *United States*, 35 Fed. 889 (M. D. Ala., 1887), where a United States Commissioner was held entitled to docket fees as fixed by the Revised Statutes, notwithstanding the inadequacy of the appropriation made therefor; *Erwin* v. *United States*, 37 Fed. 470 (S. D. Ga. 1889), where a clerk of the court was held entitled to the per diem allowance provided by the Revised Statutes; *United States* v. *Aldrich*, 58 Fed. 688 (C. C. A. 1st, 1893), where the Circuit Court made a similar ruling; and *Archbald* v. *United States*, 218 Fed. 270 (M. D. Pa. 1914), where a judge of the Commerce Court was held entitled to the expense allowance provided by the Act creating the court, notwithstanding the failure of Congress to appropriate funds to pay the allowance.

The Court of Claims has likewise recognized the principle in the cases of *Graham* v. *United States*, 1 C. Cls. 380; *Collins* v. *United States*, 15 C. Cls. 22; *Geddes* v. *United States*, 38 C. Cls. 428; *Strong* v. *United States*, 60 C. Cls. 627, and other similar cases. The case of *Geddes* v. *United States*, *supra*, invites particular attention, for there the effect of a *proviso* to an appropriation Act containing language substantially similar to that here involved is fully discussed, and held not to affect a right created by an earlier statute.[1]

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be denied.

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JOHN W. GASKINS,
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March, 1940.

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[1]Reference is made in foot-note on page 11 of petitioner's brief to the case of *Strauss* v. *United States*, decided by the Court of Claims on January 8, 1940, and not yet officially reported. While the court cited the decision in the present case as authority for its decision, it did not rely specifically upon it, as stated by the petitioner. Instead it also cited *United States* v. *Langston*, 118 U. S. 389; *Miller* v. *United States*, 86 C. Cls. 609; and *Geddes* v. *United States*, 38 C. Cls. 428. The soundness of the court's decision is indicated by the fact that the Government submitted the case without argument, and cited no authority whatsoever in the brief filed in defense of the case.